A

BIRD DOMINIC JUDE

v.

PP

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
AHMAD MAAROP FCJ
ZAINUN ALI FCJ
JEFFREY TAN FCJ
C RAMLY ALI FCJ
[CRIMINAL APPEAL NO: 05-226-09-2013(W)]
8 APRIL 2014

D ***CRIMINAL PROCEDURE:*** *Appeal - Acquittal, against - Arrest pending appeal - Application under s. 56A Courts of Judicature Act 1964 allowed by Court of Appeal - Appeal against - Whether warrant of arrest defective - Whether prosecution must tender proposed petition of appeal to demonstrate perverseness of trial court's judgment - Purpose of s. 56A - Whether to ensure that right of prosecution to appeal is not rendered* E *academic or nugatory - Whether merits in prosecution's appeal to be considered - Whether appellant admitted to bail*

F The accused ('appellant') who was charged in the High Court for an offence of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952, was acquitted and discharged after succeeding in raising a reasonable doubt in the prosecution's case. The prosecution ('respondent'), however, appealed to the Court of Appeal and at the same time, applied under s. 56A of the Courts of Judicature Act 1964 ('CJA') seeking a warrant of arrest for the G appellant to be arrested and remanded in prison pending the disposal of the prosecution's appeal at the Court of Appeal. Upon balancing the relevant factors, the Court of Appeal held that the balance of justice lay in favour of admitting the appellant to bail until the disposal of the respondent's appeal. Dissatisfied, the H appellant appealed to this court. It was contended, *inter alia*, that (i) the appellant's fundamental rights guaranteed under arts. 5(1) and 8(1) of the Federal Constitution ('FC') were violated; (ii) the warrant of arrest was defective as the grounds contained therein were contrary to established facts and contained false accusation; I (iii) the appellant was never informed that he was supposed to attend before the Court of Appeal on 9 September 2013; and (iv) the respondent must tender a proposed petition of appeal to demonstrate the perverseness of the judgment of the trial court.

Held (dismissing appeal)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) The defect in the warrant of arrest was not fatal and did not affect the respondent's application. At the first stage of the *ex parte* application, the respondent had fulfilled the threshold requirement to justify the granting of the warrant of arrest, directing the appellant to be brought before the court. The said warrant was issued pursuant to a valid legal power of the court. It had been executed and the appellant was brought before the court on 10 September 2013. The warrant itself made reference to the provision of s. 56A of the CJA and the order of court given on 10 September 2013. (para 14)

(2) There was no substantial miscarriage of justice as a result of the flawed terms of the warrant as contended by the appellant. The court was required at the second stage of the *inter partes* hearing of the respondent's application to either remand the appellant to prison or to admit him to bail. Any irregularity of the initial arrest which arose from the flawed terms of the warrant of arrest had been overtaken by the subsequent event when the appellant was brought before the court on 10 September 2013. The court had the jurisdiction to hear the second stage of the application notwithstanding any irregularity or flaws in the terms of the warrant of arrest. (para 15)

(3) Section 56A of the CJA did not infringe art. 8(1) of the FC. Section 56A is designed to confer judicial power upon the court to grant an order that will have the effect of preserving the integrity of any criminal appeal pending before it. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and State. Section 56A serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who had been acquitted by the High Court. As long as an accused person is acquitted at the High Court, the public prosecutor can apply for a warrant under s. 56A. (paras 17-19)

(4) An appeal is a continuation of a trial. Consequently, the criminal proceeding against the appellant is continued. This gives jurisdiction to the Court of Appeal to re-hear the case and decide on the appellant's guilt or innocence in respect of the drug trafficking charge against him. The power to remand the appellant or admit him to bail pending the disposal of the appellant's appeal by the Court of Appeal was necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the appellant. It would not be desirable that pending the appeal against the acquittal of a capital offence such as drug trafficking; the acquitted person should remain at large without conditions while his fate has yet to be decided by the appellate court. (para 21)

(5) The prosecution was not required to tender a proposed petition of appeal to demonstrate the perverseness of the judgment of the trial court. It would be sufficient if the prosecution could show that it had a strong likelihood of success in the appeal proper. In most cases, the full written judgment of the trial judge and notes of proceedings would not be readily made available soon after the decision of the case was delivered. Hence, on the facts, at the stage of its application under s. 56A, the prosecution would not be placed in a position to put up a proposed petition of appeal to state that the order of acquittal recorded by the High Court was perverse or clearly erroneous in the face of the record. The merits of the prosecution's appeal in an application under s. 56A was not a relevant matter for consideration. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh ('perayu'), yang dituduh di Mahkamah Tinggi atas kesalahan mengedar dadah di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, telah dilepaskan dan dibebaskan selepas berjaya membangkitkan keraguan munasabah terhadap kes pendakwaan. Pihak pendakwaan ('responden'), walau bagaimanapun, merayu ke Mahkamah Rayuan dan pada masa yang sama, telah membuat permohonan di bawah s. 56A Akta Mahkamah Kehakiman 1964 ('AMK') memohon untuk waran tangkap supaya perayu ditangkap dan ditahan di penjara sehingga pelupusan rayuan pendakwaan di Mahkamah Rayuan. Dalam mempertimbangkan faktor-faktor relevan, Mahkamah Rayuan memutuskan bahawa keadilan memerlukan perayu dibenarkan jamin sehingga pelupusan rayuan

responden. Tidak berpuas hati, perayu merayu ke mahkamah ini. Adalah dihujahkan, antara lain, bahawa (i) hak asasi perayu yang dijamin di bawah perkara 5(1) dan 8(1) Perlembagaan Persekutuan ('Perlembagaan') telah dilanggar; (ii) waran tangkap adalah cacat memandangkan alasan di dalamnya bercanggah dengan fakta terbukti dan mempunyai tuduhan palsu; (iii) perayu tidak dimaklumkan bahawa dia sepatutnya hadir di mahkamah pada 9 September 2013; dan (iv) responden mesti mengemukakan petisyen rayuan yang dicadangkan untuk menunjukkan percanggahan penghakiman mahkamah bicara.

Diputuskan (menolak rayuan)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Kecacatan dalam waran tangkap tidak fatal dan tidak menjejaskan permohonan responden. Pada peringkat pertama permohonan *ex parte*, responden telah mematuhi kehendak ambang untuk menjustifikasikan kebenaran waran tangkap mengarah responden untuk dibawa ke mahkamah. Waran tersebut dikeluarkan melalui kuasa sah mahkamah. Ia telah dimeteraikan dan perayu dibawa ke mahkamah pada 10 September 2013. Waran tersebut, dengan sendirinya, membuat rujukan kepada peruntukan s. 56A AMK dan perintah mahkamah yang diberikan pada 10 September 2013.

(2) Tiada sebarang ketidakadilan yang disebabkan oleh terma-terma cacat dalam waran seperti dihujahkan oleh perayu. Mahkamah perlu pada peringkat kedua pendengaran *inter partes* permohonan responden untuk, sama ada menangkap perayu dan dimasukkan ke penjara, atau membenarkannya dijamin. Sebarang salah aturan terhadap tangkapan awal yang berbangkit daripada terma-terma cacat dalam waran tangkap telah pun didahului oleh kejadian seterusnya apabila perayu dibawa ke mahkamah pada 10 September 2013. Mahkamah mempunyai bidang kuasa untuk mendengar peringkat kedua permohonan walaupun terdapat salah aturan atau kecacatan dalam terma-terma waran tangkap.

(3) Seksyen 56A AMK tidak melanggar perkara 8(1) Perlembagaan. Seksyen 56A dibentuk untuk memberi kuasa kehakiman kepada mahkamah untuk memberi perintah yang akan mempunyai kesan untuk mengekalkan integriti bagi

A sebarang rayuan jenayah yang masih belum didengar. Ia berniat untuk memudahkan pendengaran penuh rayuan berdasarkan merit supaya keadilan bukan sahaja dibuat kepada tertuduh malah juga kepada orang awam dan Negeri. Seksyen 56A membekalkan kehendak spesifik bagi memastikan bahawa hak
B pendakwaan untuk merayu tidaklah akademik ataupun sia-sia disebabkan ketidakhadiran tertuduh yang telah dibebaskan oleh Mahkamah Tinggi. Selagi seseorang tertuduh dibebaskan di Mahkamah Tinggi, pihak pendakwaan boleh memohon untuk suatu waran di bawah s. 56A.

C

(4) Rayuan adalah sambungan sesuatu perbicaraan. Dengan itu, prosiding jenayah terhadap perayu diteruskan. Ini memberi bidang kuasa kepada Mahkamah Rayuan untuk mendengar semula kes dan memutuskan kesalahan atau ketidakbersalahan
D berkenaan tuduhan mengedar dadah terhadapnya. Kuasa untuk menangkap perayu atau membenarkan jamin sehingga pelupusan rayuan perayu di Mahkamah Rayuan adalah diperlukan bagi pelaksanaan efektif bidang kuasa mahkamah terhadap kesalahan yang dituduh dilakukan oleh perayu. Ia
E tidak suaimanfaat bahawa sehingga menunggu rayuan terhadap pembebasan bagi kesalahan hukuman mati seperti mengedar dadah; orang yang telah dibebaskan berada di luar tanpa sebarang syarat yakni nasibnya masih belum diputuskan oleh mahkamah rayuan.

F

(5) Pihak pendakwaan tidak perlu mengemukakan petisyen rayuan yang dicadangkan untuk menunjukkan percanggahan penghakiman mahkamah bicara. Adalah mencukupi jika pendakwaan boleh menunjukkan bahawa ia mempunyai
G kemungkinan teguh untuk berjaya semasa rayuan. Dalam kebanyakan kes, penghakiman bertulis tidak dapat diperolehi sejurus selepas keputusan kes diberikan. Oleh itu, berdasarkan fakta, pada peringkat permohonan di bawah s. 56A AMK, pihak pendakwaan tidak berada dalam keadaan untuk
H mengemukakan petisyen rayuan yang dicadangkan untuk menyatakan bahawa perintah pembebasan oleh Mahkamah Tinggi adalah bertentangan atau salah. Merit rayuan pendakwaan dalam suatu permohonan di bawah s. 56A bukanlah suatu hal yang relevan untuk dipertimbangkan.

I

Case(s) referred to:
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
Datuk Haji Harun Haji Idris v. PP [1976] 1 LNS 19 FC ***(refd)***
In Re Mohamad Ezam Mohd Nor [2002] 5 CLJ 156 HC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
PP v. Norman Ismail [2008] 5 CLJ 261 CA ***(refd)***
Saw Kim Hai & Anor v. Regina [1955] 1 LNS 140 HC ***(refd)***
State (Trimbole) v. The Governor of Mountjoy [1985] IR 550 ***(dist)***
State of UP v. Poosu & Anor [1976] 3 SCC 1 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 56A
Criminal Procedure Code, s. 41
Dangerous Drugs Act 1952, s. 39B(1)(a)
Federal Constitution, arts. 5(1), (3), 8(1)
Rules of the Court of Appeal 1994, r. 58

Code of Criminal Procedure [Ind], s. 390
Constitution of India [Ind], art. 136
Constitution of Ireland, art. 40

For the appellant - Shafee Abdullah (Tania Scivetti with him); M/s Shafee & Co
For the respondent - Saiful Edris Zainuddin, DPP

[Editor's note: For the Court of Appeal judgment, please see Bird Dominic Jude v. PP [2013] 8 CLJ 471.]

Reported by Kumitha Abd Majid

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal in granting the application of the prosecution under s. 56A of the Courts of Judicature Act 1964 ("CJA") and admitting the appellant to bail until the disposal of the respondent's appeal against the decision of the High Court acquitting and discharging the appellant for the offence of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952. At the conclusion of the trial on 4 September 2013, the appellant was acquitted and discharged by the High Court after the court ruled that the defence had succeeded in raising a reasonable doubt on the prosecution's case.

[2] Section 56A of the CJA provides as follows:

> Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.

[3] The application of s. 56A of the CJA has to be read in conjunction with r. 58 of the Rules of the Court of Appeal 1994 which states as follows:

> (1) Within fourteen days of the decision of the High Court or within such extended time as the Court may allow the appellant shall file in the Registry of the High Court at the place where the decision appealed against was given a Notice of Appeal and eight copies thereof. A copy of the Notice of Appeal shall be sent by the appellant to the Registrar of the Court of Appeal.
>
> (2) The Notice of Appeal shall be substantially in Form 5 in the First Schedule.
>
> (3) As soon as Notice of Appeal is filed by the Public Prosecutor as in sub-rule (1), the Court of Appeal may on an application by the Public Prosecutor issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail in accordance with the provisions of section 56A of the Courts of Judicature Act 1964 (Act 91).
>
> (4) The application under sub-rule (3) may be made by motion *ex parte* and for the purpose of this sub-rule, rules 71 and 72 shall apply.

Proceedings At The Court Of Appeal

[4] The prosecution was dissatisfied with the decision by the High Court and filed a notice of appeal on 9 September 2013 and at the same time applied by way of notice of motion under s. 56A of the CJA to the Court of Appeal seeking a warrant of arrest directing the appellant be arrested and remanded in prison pending the disposal of the prosecution's appeal at the Court of Appeal. The grounds advanced by the prosecution in supporting their application essentially are these. Section 56A is enacted to secure the attendance of an accused person at the hearing of an appeal

against him who was earlier acquitted and discharged by the High Court. The provision as provided for under s. 56A is to be applied judiciously and the prosecution has never abused this provision as it has been used sparingly. It is only applied whenever there is a strong likelihood of success in the appeal proper.

[5] The appellant in opposing the prosecution's application questioned the constitutionality of s. 56A of the CJA and asserted that his fundamental rights guaranteed under arts. 5(1) and 8(1) of the Federal Constitution ("FC") are violated. The appellant also contended that the warrant of arrest was defective as the grounds contained therein were contrary to established facts and contained false accusation.

[6] The Court of Appeal upon balancing the relevant factors held that the balance of justice lay in favour of admitting the appellant to bail at RM50,000 with two local sureties, and in default, a warrant be issued committing the appellant to prison until the disposal of the prosecution's appeal against the acquittal decision of the learned High Court Judge. As for the conditions of the bail, the appellant had to surrender his travel documents. The appellant had to also provide the address of his fixed place of residence and report to the nearest police station every Monday at 5pm.

Submission Of The Appellant

[7] Learned counsel for the appellant submitted before us that this court should take cognisance that s. 56A of the CJA is silent on the procedure of an application for a warrant of arrest and its due execution. It was argued that the provisions of the Criminal Procedure Code ("CPC"), in particular s. 41 of the CPC, should be resorted to as well in relation to the application of s. 56A of the CJA to give the application of the said section its full effect. On that note it is the contention of the appellant that the procedural requirement under s. 41 of the CPC has not been complied with by the respondent. Section 41 of the CPC provides as follows:

> The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person arrested and if so required shall show him the warrant or a copy thereof under the seal of the Court issuing the warrant.

[8] Learned counsel for the appellant further submitted that under art. 5(3) of the FC the appellant was also entitled to be informed on the grounds of his arrest. Article 5(3) of the FC states:

> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

[9] Based on the facts of this case it is the appellant's contention that the respondent had failed to notify and explain the substance of the warrant to the appellant as mandatorily required under s. 41 of the CPC and under art. 5(3) of the FC.

[10] Learned counsel for the appellant also submitted that the warrant of arrest executed on the appellant was defective. It was argued that the substance of the warrant of arrest which formed the basis and grounds for the issuance of the warrant was badly drafted without an *iota* of truth in it to secure the arrest of the appellant. It is the contention of the appellant that he was never informed that he was supposed to attend before the Court of Appeal on 9 September 2013 at 9am. It was inaccurate to state in the warrant that the appellant "sengaja gagal hadir di Mahkamah tersebut" when in fact no such notice had ever been issued by the Court of Appeal to request the appellant to appear before the Court of Appeal for the hearing of the appeal that never took place on 9 September 2013. Even if the appellant were informed of the hearing of the appeal proper, he was not able to abscond or refuse to attend because he was at all material times in the custody of the Department of Immigration of Malaysia since his acquittal on 4 September 2013, which fact was known to the respondent. Furthermore, there was no need for him to attend as it was not the hearing of the appeal proper itself as incorrectly stated in the warrant of arrest.

[11] It is the submission of the appellant that such gross failure to consider the mandatory requirement under s. 41 of the CPC and art. 5(3) of the FC by the respective authorities executing the warrant of arrest has rendered the arrest of the appellant under s. 56A of the CJA invalid and unlawful.

[12] On the constitutionality of s. 56A of the CJA it was submitted for the appellant amongst others that it is an established principle of law that has been adopted consistently by the courts, that in dealing with laws which infringed the fundamental liberties

of an individual, such laws must be interpreted restrictively, and that laws which emphasized the liberty of an individual must be given broad construction (See the case of *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301). If such principle is to stand and remain valid, s. 56A of the CJA must be deemed unconstitutional especially in the light that it is a provision of law which allows a "*defacto* stay" on the effect of the judgment of an acquittal and discharge of an individual by subsequently detaining that very individual when he has obtained a court pronouncement of his innocence or at least a "not guilty" verdict. On this point learned counsel for the appellant referred to us the case of *State (Trimbole) v. The Governor of Mountjoy* [1985] IR 550 wherein the High Court of Ireland after an inquiry pursuant to art. 40 (equivalent to our art. 5) of their Constitution to determine the lawfulness of the arrest of the subject held that there was illegality in the original arrest and the subject was immediately released. The respondent applied to the Supreme Court of Ireland for a stay of the order of the High Court to release the subject pending the appeal. The Irish Supreme Court (Finlay CJ, Walsh, Henchy, Griffin, Hederman and McCarthy JJ) in refusing the application *inter alia* held that:

> ... whatever powers the court may have to make its ordinary appellate jurisdiction effective, such powers would not be exercised in a manner inconsistent with the Constitution ...

[13] Learned counsel for the appellant further submitted that it would not be just for the appellant to be arrested and detained simply on the basis of an appeal filed by the respondent. It must also be shown beyond reasonable doubt by the respondent in their affidavit in support of the s. 56A of the CJA application that the judgment of the learned High Court Judge was so perverse on the face of the record that the arrest and detention is justified to prevent an injustice from further occurring. It was also suggested that the prosecution must also tender a proposed petition of appeal to demonstrate the perverseness of the judgment of the trial court. A mere allegation of incorrect decision by the High Court Judge as contended by the prosecution in the present case is not enough, nor sufficient to deprive a person of his liberty that has been deservingly earned after a full trial. In support of this proposition the case of *State of UP v. Poosu & Anor* [1976]

A 3 SCC 1 was referred to us wherein His Lordship RS Sarkaria J in delivering the judgment of the Supreme Court of India at p. 5, held as follows:

> In addition, the Court may also take into consideration the period
B during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing before this Court. In the context, it must be remembered that this over-riding discretionary jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the order of acquittal recorded by the High Court is
C perverse or clearly erroneous and results in a gross miscarriage of justice.

Decision Of This Court

D **[14]** On the appellant's contention that due to the illegality of the arrest *via* the defective warrant and its improper execution on the appellant, any remand pursuant to such illegality would nullify the remand made pursuant to s. 56A of the CJA, we are of the view that the defect in the warrant of arrest is not fatal and does not affect the respondent's application. We agree with the views
E expressed by the Court of Appeal that at the first stage of the *ex parte* application, the respondent has fulfilled the threshold requirement to justify the granting of the warrant of arrest directing the appellant to be brought before the court. The said warrant of arrest was issued pursuant to a valid legal power of the
F court. It had been executed and the appellant was brought before the court on 10 September 2013. The warrant itself made reference to the provision of s. 56A of the CJA and the order of the court given on 10 September 2013.

G **[15]** It is our judgment that there has not been a substantial miscarriage of justice as a result of the flawed terms of the warrant as contended by the appellant. This is because the court therein was required at the second stage of the *inter-partes* hearing of the respondent's application either to remand the appellant to prison
H or to admit him to bail. It is our considered view that any irregularity of the initial arrest arising from the flawed terms of the warrant of arrest had been overtaken by the subsequent event when the appellant was brought before the court on 10 September 2013. The court had the jurisdiction to hear the second stage of
I the application notwithstanding any irregularity or flaw in the

terms of the warrant of arrest. On this point we would refer to the case of *Saw Kim Hai & Anor v. Regina* [1955] 1 LNS 140; [1956] 22 MLJ 21 wherein Spencer Wilkinson J held:

> *It is settled law that when an accused person is before a Court, the Court has jurisdiction to try him notwithstanding the fact that his arrest may have been illegal and it has recently been held by the Privy Council that the fact that evidence has been illegally obtained does not affect the question of its admissibility.* (emphasis added)

[16] As regards the appellant's contention on the unconstitutionality of s. 56A of the CJA which allows the prosecution to effect his arrest and subsequent detention after his acquittal by the High Court and thereby violating his constitutional rights as guaranteed by arts. 5(1) and 8(1) of the FC, with respect we could not agree with such a contention. On this issue the question is whether there is a specific law authorising such deprivation of the applicant personal liberties (See the case of *In Re Mohamad Ezam Mohd Nor* [2002] 5 CLJ 156; [2001] 3 MLJ 372). It is also to be noted that art. 5(1) of the FC provides as follows:

> *No person shall be deprived of his life or personal liberty save in accordance with law.* (emphasis added)

[17] The law on point is therefore s. 56A of the CJA which is designed to confer judicial power upon the court to grant an order that will have the effect of preserving the integrity of any criminal appeal pending before it. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the state. Section 56A of the CJA in our considered view serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who had been acquitted by the High Court (See the case of *PP v. Norman Ismail* [2008] 5 CLJ 261; [2008] 4 MLJ 830).

[18] On the question of whether s. 56A of the CJA has infringed art. 8(1) of the FC our answer to it is in the negative. Article 8(1) of the FC provides:

> All persons are equal before the law and entitled to equal protection of the law.

[19] In the present case it is our finding that s. 56A of the CJA applies to everybody whether a citizen or not. As long as an accused person is acquitted at the High Court, the Public Prosecutor can apply for a warrant under s. 56A of the CJA. Section 56A of the CJA in our view is not discriminatory in nature. On the test as to whether the provision of a statute is discriminatory in nature we would refer to the case of *Datuk Haji Harun Haji Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 where Suffian LP had this to say:

> With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be - if the laws is not discriminatory, if for instance it obviously applies to everybody, it is good law ...

[20] As regards the decision in the case of *State (Trimbole) v. the Governor of Mountjoy* (*supra*) cited by learned counsel for the appellant to support his argument on the unconstitutionality of s. 56A of the CJA, we are of the view the said case can be distinguished on the facts from the present case. There, the High Court of Ireland was dealing with a case which was related to a *habeas corpus* application challenging remand orders. Whereas our case here concerns the appellant who was charged with an offence of drugs trafficking and was subsequent acquitted and discharged. The appellant then appealed to the Court of Appeal. Unlike the position in Ireland, our Court of Appeal is empowered under s. 56A of the CJA to cause an accused person who has been acquitted to be arrested and committed to prison or given bail pending the disposal of the appeal against the acquittal. No such statutory power has been conferred on the Irish Supreme Court.

[21] Furthermore, in the present case, the prosecution has filed a notice of appeal against the acquittal decision of the High Court. On this point it is important to consider that an appeal is a continuation of a trial (See the case of *Balasingham v. PP* [1959] 1 LNS 8; [1959] 25 MLJ 193). Consequently, the criminal proceedings against the appellant is continued. This gives jurisdiction to the Court of Appeal to rehear the case and decide on the appellant's guilt or innocence in respect of the drug trafficking charge against him. It is our judgment that the power to remand the appellant or admit him to bail pending the disposal of the appellant's appeal by the Court of Appeal is necessary for

an effective exercise of the court's jurisdiction over the offence allegedly committed by the appellant. It would not be desirable that pending the appeal against acquittal of a capital offence such as drug trafficking, the acquitted person should remain at large without conditions while his fate has yet to be decided by the appellate court.

[22] On learned counsel for the appellant's reliance on the case of *State of UP v. Poosu & Anor* (*supra*) to support his contention that the prosecution must demonstrate that the order of acquittal recorded by the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice, we are not in agreement with him. In *Poosu*'s case the Indian Supreme Court had set out some guidelines as to how powers under s. 390 of the Indian Code of Criminal Procedure (in substance similar with our s. 56A of the CJA) should be exercised. It is important to note that in *Poosu*'s case the Indian Supreme Court was exercising its supervisory jurisdiction under art. 136 of the Indian Constitution. The said art. 136 reserves supervisory jurisdiction over decision of all courts and tribunals. On the guidelines as to how powers under s. 390 of the Indian Code of Criminal Procedure should be exercised as set out in *Poosu*'s case, it is our considered view that some of the said guidelines ordinarily may be considered by our Court of Appeal when it is exercising its powers under s. 56A of the CJA.

[23] As regards the suggestion of learned counsel for the appellant that the prosecution must also tender a proposed petition of appeal to demonstrate the perverseness of the judgment of the trial court, with respect we do not think that the prosecution is required to do so. It would be sufficient if the prosecution could show to the court that it has a strong likelihood of success in the appeal proper. On this point we need to state here that in most cases the full written judgment of the trial judge and the notes of proceedings would not be readily made available soon after the decision of the case is delivered. Therefore, in our view, at the stage of its application under s. 56A of the CJA as in the present case, the prosecution would not be placed in a position to put up a proposed petition of appeal to state that the order of acquittal recorded by the High Court is perverse or

clearly erroneous in the face of the record. We agree with the view expressed by the Court of Appeal that the merits of the prosecution's appeal in an application under s. 56A of the CJA is not a relevant matter for consideration.

[24] For the reasons abovestated we find no merits in the appellant's appeal. The appeal is therefore dismissed.